

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,
Plaintiff,
v.
MARIE ELIZABETH CASAS,
Defendant.

Case No.: 3:10-cr-3045-BTM

**ORDER DENYING WITHOUT
PREJUDICE MOTION FOR
COMPASSIONATE RELEASE**

[ECF No. 95]

Defendant Marie Elizabeth Casas is serving her 189 month sentence at Federal Medical Center Carswell (“FMC Carswell”) for violations of 18 U.S.C. § 1951(a) (interference with commerce by threats or violence) and 18 U.S.C. § 924(c)(1)(A)(ii) (brandishing a firearm during and in relation to any crime of violence). The Court previously denied without prejudice Casas’ motion to reduce her sentence pursuant to 18 U.S.C. § 3582(c)(1)(A). (ECF No. 94.) Casas now renews her motion. (ECF No. 95 (“Mot.”).) The Court **DENIES WITHOUT PREJUDICE** Casas’ renewed motion for the reasons below.

I. BACKGROUND

On March 1, 2011, Casas pled guilty to two counts of robbery or attempted robbery affecting commerce, in violation of 18 U.S.C. § 1951(a), and one count of brandishing a firearm during and in relation to a crime of violence, in violation of

1 18 U.S.C. § 924(c)(1)(A)(ii), which the Court accepted. (ECF Nos. 26, 28, 30.)
 2 She was sentenced to 189 months in Bureau of Prison (“BOP”) custody. (ECF No.
 3 42.) To date, Casas has served approximately 136 months of her sentence. She
 4 is scheduled to be released on December 26, 2023.

5 Casas received her first dose of the Pfizer COVID-19 vaccine on December
 6 19, 2020, her second dose on January 5, 2021, and her third dose, or booster shot,
 7 on September 22, 2021. (ECF No. 82, Exh. 5; ECF No. 114.)

8 Casas argues that, notwithstanding her vaccinated status, she remains at
 9 risk of severe illness or death from COVID-19, because she is
 10 immunocompromised and has several underlying medical conditions. (Mot. at 10-
 11 13.) Casas also argues that she is unable to participate in a Residential Drug
 12 Abuse Program (“RDAP”) while in custody. (Mot. at 13-16.) The Government
 13 opposes Casas’ Motion, arguing that Casas does not have extraordinary and
 14 compelling reasons to reduce her sentence. (ECF No. 102 (“Gov. Opp.”).) The
 15 Court held a hearing on Casas’ Motion on August 25, 2021. (ECF No. 107.)

16 **II. LEGAL STANDARD**

17 As amended by the First Step Act, 18 U.S.C. § 3582(c)(1)(A) provides that:

18 [T]he court, upon motion of the Bureau of Prisons, or upon motion of
 19 the defendant after the defendant has fully exhausted all administrative
 20 rights to appeal a failure of the Bureau of Prisons to bring a motion on
 21 the defendant’s behalf or the lapse of 30 days from the receipt of such
 22 a request by the warden of the defendant’s facility, whichever is earlier,
 23 may reduce the term of imprisonment . . . after considering the factors
 24 set forth in section 3553(a) to the extent that they are applicable, if it
 25 finds that –

26 (i) extraordinary and compelling reasons warrant such a reduction

27 ...

28 and that such a reduction is consistent with applicable policy
 statements issued by the Sentencing Commission.

18 U.S.C. § 3582(c)(1)(A).

The Ninth Circuit has held “the Sentencing Commission has not yet issued

1 a policy statement ‘applicable’ to 3582(c)(1)(A) motions filed by a defendant” and
 2 “the Sentencing Commission’s statements in U.S.S.G. § 1B1.13 may inform a
 3 district court . . . [but] are not binding.” *United States v. Aruda*, 993 F.3d 797, 802
 4 (9th Cir. 2021).

5 **III. DISCUSSION**

6 **A. Exhaustion**

7 Casas filed a new request for compassionate release with the Warden of
 8 FMC Carswell on May 7, 2021. (Mot., Exh. A.) Because thirty days have lapsed
 9 since Casas initiated the administrative remedy process, she has satisfied the
 10 exhaustion requirement. See 18 U.S.C. § 3582(c)(1)(A).

11 **B. Extraordinary and Compelling Reasons**

12 Casas argues that she meets the threshold requirement of extraordinary and
 13 compelling reasons to merit compassionate release because: (1) she remains at
 14 risk of severe illness or death from COVID-19, due to several underlying medical
 15 conditions and her immunocompromised status; and (2) she is unable to
 16 participate in a RDAP program while in custody. (Mot.)

17 **i. COVID-19 Risks**

18 In her first motion for compassionate release, Casas claimed that she
 19 suffered from multiple underlying medical conditions that increased her risk of
 20 severe illness or death from COVID-19, including severe obesity, Type 2
 21 diabetes, chronic angina, malignant hypertension, rheumatoid arthritis, asthma,
 22 posttraumatic stress disorder, and a depressive disorder. (ECF No. 75.) On
 23 September 16, 2020, after a clinical encounter with Casas by Dr. Beatriz Parra,
 24 Dr. Parra wrote in an Administrative Note, under the section “Provisional
 25 Diagnosis,” that Casas had a “[h]igh risk of mortality if [she] contract[ed] COVID-
 26 19.” (ECF No. 75, Exh. C, at 29.)

27 Casas subsequently received her first dose of the Pfizer COVID-19 vaccine
 28 on December 19, 2020, her second dose on January 5, 2021, and her third dose,

1 or booster shot, on September 22, 2021. (ECF No. 82, Exh. 5; ECF No. 114.)

2 According to the Center for Disease Control and Prevention ("CDC"):

3 COVID-19 vaccination reduces the risk of COVID-19 and its potentially
 4 severe complications. All COVID-19 vaccines currently authorized for
 5 use in the United States helped protect people against COVID-19,
 6 including severe illness, in clinical trial settings. So far, studies that
 7 have looked at how COVID-19 vaccines work in real-world conditions
 8 (vaccine effectiveness studies) have shown that these vaccines are
 9 working well. . . . While COVID-19 vaccines are working well, some
 10 people who are fully vaccinated against COVID-19 will still get sick,
 11 because no vaccines are 100% effective. These are called vaccine
 12 breakthrough cases. However, data suggest that vaccination may
 make symptoms less severe in people who are vaccinated but still get
 COVID-19. mRNA COVID-19 vaccines have been shown to provide
 protection against severe illness and hospitalization among people of
 all ages eligible to receive them.

13 CDC, *COVID-19 Vaccines Work*, [https://www.cdc.gov/coronavirus/2019-](https://www.cdc.gov/coronavirus/2019-ncov/vaccines/effectiveness/work.html)
 14 [ncov/vaccines/effectiveness/work.html](https://www.cdc.gov/coronavirus/2019-ncov/vaccines/effectiveness/work.html) (last visited November 10, 2021).

15 In her renewed motion for compassionate release, Casas focuses on her
 16 immunocompromised status and the risk that she may not be reliably protected by
 17 the vaccine. (Mot. at 10.) Casas submits the declaration of Dr. Tara Vijayan, who
 18 reviewed Casas' medical records from the BOP. (Mot., Exh. B.) According to Dr.
 19 Vijayan:

20 Ms. Casas is immunocompromised. She has rheumatoid arthritis,
 21 which means that her body mounts an inappropriate immune response
 22 to her own cells and tissues, specifically her joints. This results in a
 23 chronic inflammation that can cause joint destruction. . . . To counter
 24 this inflammation, she takes immunosuppressive medication.
 25 Leflunomide is an antimetabolite that decreases the production of
 26 immune cells, and her decreased number of immune cells renders her
 27 unable to mount an appropriate immune response to infections,
 28 including viruses such as SARS-CoV-2. Medications like leflunomide
 also result in a decreased host response to immunizations. Thus,
 because Ms. Casas is immunocompromised due to her taking
 leflunomide, she remains at risk for infection and subsequent severe
 illness or death from COVID-19, even though she has been fully

1 vaccinated with the Pfizer vaccine.

2 *Id.* According to the CDC:

3 Immunocompromised people have lower vaccine effectiveness
4 compared to non-immunocompromised people (59-72% vs. 90-94%,
5 respectively). Immunocompromised people are also more likely to
6 have serious breakthrough infections, with 40-44% of hospitalized
breakthrough cases occurring among immunocompromised people.

7 CDC, *ACIP Evidence to Recommendations for Use of an Additional COVID-19*
8 *Vaccine Dose in Immunocompromised People*,
9 [https://www.cdc.gov/vaccines/acip/recs/grade/covid-19-immunocompromised-](https://www.cdc.gov/vaccines/acip/recs/grade/covid-19-immunocompromised-etr.html)
10 [etr.html](https://www.cdc.gov/vaccines/acip/recs/grade/covid-19-immunocompromised-etr.html) (last accessed November 10, 2021). In addition, the CDC states that:

11 People who are moderately to severely immunocompromised make up
12 about 3% of the adult population and are especially vulnerable to
13 COVID-19 because they are more at risk of serious, prolonged illness.
14 Studies have found that some immunocompromised people don't
15 always build the same level of immunity after vaccination the way non-
16 immunocompromised people do and may benefit from an additional
17 dose to ensure adequate protection against COVID-19. Smaller
18 studies found fully vaccinated immunocompromised people made up
19 a large proportion of hospitalized "breakthrough cases," suggesting
20 immunocompromised people are more likely to transmit the virus to
21 household contacts. An additional dose may prevent serious and
22 possibly life-threatening COVID-19 in people who may not have
responded to their initial vaccine series. In ongoing clinical trials, the
mRNA COVID-19 vaccines (Pfizer-BioNTech or Moderna) have been
shown to prevent COVID-19 following the two-dose series. Limited
information suggests that immunocompromised people who have low
or no protection after two doses of mRNA vaccines may have an
improved response after an additional dose of the same vaccine.

23 CDC, *COVID-19 Vaccines for Moderately to Severely Immunocompromised*
24 *People*, [https://www.cdc.gov/coronavirus/2019-](https://www.cdc.gov/coronavirus/2019-ncov/vaccines/recommendations/immuno.html)
25 [ncov/vaccines/recommendations/immuno.html](https://www.cdc.gov/coronavirus/2019-ncov/vaccines/recommendations/immuno.html) (last accessed November 10,
26 2021). The CDC also states that:

27 Moderately and severely immunocompromised people may not mount
28 a protective immune response after initial vaccination and,

furthermore, their protection by primary vaccination may wane over time making them susceptible to severe COVID-19. ACIP and CDC have made age-specific recommendations for an additional primary dose and a booster dose for this population. . . . Moderate and severe immunocompromising conditions and treatments include but are not limited to:

- Active treatment for solid tumor and hematologic malignancies
- Receipt of solid-organ transplant and taking immunosuppressive therapy
- Receipt of CAR-T-cell therapy or hematopoietic cell transplant (HCT) (within 2 years of transplantation or taking immunosuppression therapy)
- Moderate or severe primary immunodeficiency (e.g., DiGeorge syndrome, Wiskott-Aldrich syndrome)
- Advanced or untreated HIV infection (people with HIV and CD4 cell counts <200/mm³, history of an AIDS-defining illness without immune reconstitution, or clinical manifestations of symptomatic HIV)
- Active treatment with high-dose corticosteroids (i.e., ≥20 mg prednisone or equivalent per day when administered for ≥2 weeks), alkylating agents, antimetabolites, transplant-related immunosuppressive drugs, cancer chemotherapeutic agents classified as severely immunosuppressive, tumor necrosis factor (TNF) blockers, and other biologic agents that are immunosuppressive or immunomodulatory.

Factors to consider in assessing the general level of immune competence in a patient include disease severity, duration, clinical stability, complications, comorbidities, and any potentially immune-suppressing treatment.

CDC, *Interim Clinical Considerations for Use of COVID-19 Vaccines Currently Approved or Authorized in the United States*, <https://www.cdc.gov/vaccines/covid-19/clinical-considerations/covid-19-vaccines-us.html#considerations-covid19-vax-immunocopromised> (last accessed November 10, 2021).

The Government argues that it is “unclear” that Casas meets the CDC’s criteria for immunocompromised status, because “Dr. Vijayan states that Defendant is immunocompromised due to her rheumatoid arthritis and her taking

1 of the medication Leflunomide” but “does not state that this meets the criteria laid
2 out by the CDC as immunocompromised for purposes of determining whether the
3 COVID-19 vaccine is effective.” (ECF No. 109 (“Gov. Supplemental Brief”) at 5-
4 6.) The Government also argues that “even assuming Defendant is
5 immunocompromised, the vaccine effectiveness for Pfizer 7-27 days after the
6 second dose is 71% (CI 37-87%) among immunocompromised people in terms of
7 preventing a COVID infection” and “[t]he vaccine effectiveness for Pfizer 7-27 days
8 after the second dose is 75% (CI 44-88%) among immunocompromised people in
9 terms of preventing a symptomatic COVID infection.” (*Id.* at 6; Ex. 2.) In response,
10 Casas submits a second declaration from Dr. Vijayan, who states that Casas “fits
11 into these CDC categories of someone who is immunocompromised because she
12 is receiving ‘treatment with immunosuppressive medication.’” (ECF No. 113.) Dr.
13 Vijayan also states that:

14 it would not be correct to say that vaccine effectiveness of the mRNA
15 vaccines for immunocompromised people is 71 to 75%. For some
16 immunocompromised people, the mRNA vaccines are nearly as
17 effective as they are for people who are not immunocompromised. For
18 other immunocompromised people, however, they are far less effective
19 to the point of being not effective. Some immunocompromised people
20 will have virtually no response to vaccination for COVID-19 with the
21 mRNA vaccines. In other words, some immunocompromised people
22 will receive almost no protection from having been vaccinated. One
23 should also note that these data measured vaccine effectiveness
24 relatively close in time to the second shot, and waning of immunity may
25 occur. . . . In terms of a booster shot for immunocompromised people,
26 there are some emerging data that indicates that a third dose initiates
27 an antibody response in some immunocompromised people who did
28 not have a sufficient antibody response to the two-dose series. . . . I
agree that immunocompromised people who did not respond to the
two-dose series may benefit from a third shot. However, there is no
way to know if they will benefit from a third shot, and one should not
assume that they will benefit from a third shot, considering that 50-67%
of the people who did not respond to the two-dose series were found
not to have a response to a third dose as well.

1 *Id.*

2 As of November 10, 2021, at FMC Carswell, the number of inmates and staff
 3 who have currently tested positive for COVID-19 is 0 and 13, respectively. BOP,
 4 *COVID-19 Coronavirus*, <https://www.bop.gov/coronavirus/> (last accessed
 5 November 10, 2021). The number of inmates and staff who have received full
 6 vaccinations is 1451 and 363, respectively. *Id.* The number of inmate and staff
 7 deaths from COVID-19 is 8 and 0, respectively. *Id.* The number of inmates and
 8 staff who have recovered from COVID-19 is 597 and 4, respectively. *Id.* FMC
 9 Carswell is currently at a Level 3 Modified Operational Level, which includes
 10 facility-wide use of face coverings, surgical or N95 masks, social distancing in all
 11 areas, and daily COVID-19 symptom screens and temperature checks prior to
 12 entry into the institution. *Id.*; BOP, *BOP COVID-19 Operational Levels*,
 13 https://www.bop.gov/coronavirus/covid19_modified_operations_guide.jsp.

14 On the current record, the Court cannot conclude with any reasonable
 15 degree of confidence what Casas' risk of contracting COVID-19 is, or her risk of
 16 severe illness or death if she were to contract COVID-19. Casas has now received
 17 three doses of the Pfizer COVID-19 vaccine, in accordance with current CDC
 18 recommendations for moderately to severely immunocompromised individuals.
 19 Casas takes immunosuppressive medication and there is evidence that the
 20 vaccines' efficacy may be reduced to varying degrees for some
 21 immunocompromised individuals. It is unclear to the Court the severity or degree
 22 of Casas' immunocompromised status, how likely the particulars of her
 23 immunocompromised status reduce the efficacy of the Pfizer COVID-19 vaccines
 24 she has received, and the degree of any reduced efficacy. For example, while Dr.
 25 Vijayan states in her declarations that Casas is immunocompromised, she does
 26 not state that Casas is moderately or severely immunocompromised under CDC
 27 guidelines. (See Mot., Exh. B; ECF No. 113.) Further Dr. Vijayan states that "for
 28 some immunocompromised people, the mRNA vaccines are nearly as effective as

1 they are for people who are not immunocompromised” while “[f]or other
 2 immunocompromised people . . . they are far less effective to the point of being
 3 not effective,” without stating which group Casas is more likely to fall into. (ECF
 4 No. 113.) On the current record, the Court finds it too speculative to conclude that
 5 the vaccines Casas has received are not effective in either preventing the
 6 contraction of COVID-19, or preventing severe illness or death if she were to
 7 contract COVID-19. Casas has submitted a BOP press release reporting the
 8 recent September 29, 2021 death of FMC Carswell inmate Tammy J. Lamere,
 9 “who had long-term, pre-existing medical conditions, which the [CDC] lists as risk
 10 factors for developing more severe COVID-19 disease.” (ECF No. 115-1.)
 11 However, it is unclear to the Court whether Ms. Lamere and Casas’ situations are
 12 comparable in terms of category and severity of underlying medical conditions,
 13 immunocompromised status, and vaccination status. The Court recognizes that
 14 data regarding the efficacy of the vaccines in immunocompromised individuals is
 15 limited and evolving. However, the Court is currently not satisfied that the COVID-
 16 19 risk to Casas constitutes an extraordinary and compelling circumstance
 17 meriting release.

18 **ii. Access to RDAP**

19 Casas argues that she “is in need of residential drug treatment,” but “the
 20 opportunity for [her] to participate in intensive, residential drug treatment while
 21 serving her sentence in the BOP (in RDAP) has not been and will never be
 22 provided” because “[t]he BOP records make clear that [she] was deemed
 23 unqualified for RDAP.” (Mot. at 13.) The Court does not find that Casas’ inability
 24 to participate in a RDAP program while in custody constitutes an extraordinary and
 25 compelling reason meriting release. See *United States v. Moore*, 2021 WL
 26 2417722, at *3 (D. Idaho June 11, 2021) (“[defendant] also argues that her inability
 27 to participate in Court-recommended RDAP produces an extraordinary and
 28 compelling reason for compassionate release. . . . Although unfortunate, especially

1 in light of her need and sincere desire for treatment, this alone does not produce
 2 an extraordinary or compelling reason to reduce or otherwise modify [defendant's]
 3 sentence. As such, [defendant] has not met her burden of demonstrating
 4 extraordinary and compelling reasons for her release, notwithstanding the Court's
 5 desire that she obtain treatment. [Defendant] can always do substance abuse
 6 treatment as a term and condition of supervised release once she is released from
 7 prison."); *United States v. Empey*, 2021 WL 982616, at *2 (D. Idaho Mar. 15, 2021)
 8 ("[Defendant] also suggests that he is not able to participate in RDAP, due to the
 9 firearm enhancement listed in his PSR. But BOP has discretion to determine who
 10 may participate in RDAP and the Court has no authority to alter [defendant's]
 11 sentence because BOP determined he does not qualify for RDAP. . . . [This is not
 12 an] extraordinary and compelling reason warranting release.").

13 **C. 18 U.S.C. § 3553 Sentencing Factors**


14 Because Casas has not provided extraordinary and compelling reasons
 15 meriting release, the Court need not reach the § 3553 sentencing factors.

16 **IV. CONCLUSION**

17 The motion for release under § 3582(c) is **DENIED WITHOUT PREJUDICE**.
 18 The Court recognizes that the COVID-19 situation continues to evolve. Casas may
 19 renew her motion if her circumstances change, or new data or evidence emerges.

20
 21 **IT IS SO ORDERED.**

22
 23
 24 Dated: November 16, 2021

25 
 26 Honorable Barry Ted Moskowitz
 27 United States District Judge
 28